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17  
18 UNITED STATES DISTRICT COURT  
19 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION  
20

21 PABBAN DEVELOPMENT, INC.,

22 Plaintiff,

23 vs.

24 KYPHON SARL, et al.

25 Defendants.

CASE NO. SACV 10-533 CJC (RNBx)

**[PROPOSED] PROTECTIVE ORDER**

Disc. Cutoff: May 4, 2012  
Pretrial Conf.: August 6, 2012  
Trial Date: August 14, 2012

1     **STATEMENT OF GOOD CAUSE FOR ORDER FOR THE PROTECTION**  
2                     **OF CONFIDENTIAL INFORMATION**

3             This case involves a contract dispute concerning medical devices and  
4 valuable intellectual property. Discovery and trial of this case will involve the  
5 exchange of highly sensitive information that would have value to the parties'  
6 competitors. Such information may include confidential business strategies,  
7 financial data, product design and manufacturing details, blueprints, customer lists,  
8 confidential research, development, or commercial information, and other  
9 information that is not available to the public. The parties have several direct  
10 competitors that might gain an unfair advantage if the documents exchanged in this  
11 lawsuit were made public. Therefore, in agreement with the principles laid out in  
12 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, (9th Cir. 2003), the parties  
13 have submitted this agreed protective order.

14             WHEREAS, in connection with the above-captioned matter, certain  
15 information, documents and things containing trade secrets (as defined by California  
16 Civil Code § 3426.1), and other confidential business or commercial information  
17 within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure, may be  
18 disclosed by the parties and/or nonparties voluntarily and/or in response to  
19 discovery demands;

20             WHEREAS, it would serve the interests of the parties to conduct discovery  
21 relating to this proceeding under a Protective Order pursuant to Rule 26(c) of the  
22 Federal Rules of Civil Procedure; and

23             WHEREAS, the parties have agreed to be bound by the terms of this Order  
24 and have presented the same for entry as an Order of the Court;

25             **IT IS HEREBY ORDERED:**

26             1.     This Protective Order shall apply to all information, documents,  
27 testimony and things designated CONFIDENTIAL or HIGHLY CONFIDENTIAL  
28 ATTORNEY'S EYES ONLY (collectively "Confidential Information") by the

1 parties or nonparties as provided in this Order. As used herein, “Confidential  
2 Information” means any information, documents, testimony and things so  
3 designated as more fully described in paragraphs 3a and b below.

4       2. All Confidential Information is provided solely for the purpose of this  
5 litigation between the parties and may not be used for any other purpose, except by  
6 leave of court on motion with notice to all interested parties.

7       3. Each affidavit or portion thereof, each deposition transcript or portion  
8 thereof, each interrogatory answer or portion thereof, each document or portion  
9 thereof, each premise or thing or portion thereof, which is deemed by a party or by a  
10 nonparty producing same that discloses Confidential Information will be so  
11 identified and labeled CONFIDENTIAL - PURSUANT TO COURT ORDER or  
12 HIGHLY CONFIDENTIAL - ATTORNEY’S EYES ONLY - PURSUANT TO  
13 COURT ORDER as follows:

14           a. A party or nonparty may designate material CONFIDENTIAL  
15 only if it, in concurrence with its counsel and in good faith, deems that a reasonable  
16 basis exists for limiting dissemination of the material under the standards of FRCP  
17 26 and contains confidential and/or proprietary commercial information that is not  
18 generally available to the public.

19           b. A party or nonparty may designate material HIGHLY  
20 CONFIDENTIAL - ATTORNEY’S EYES ONLY if it, in concurrence with its  
21 counsel and in good faith, deems that disclosure of such material to a party to this  
22 lawsuit would be injurious to the commercial interests of the designating entity  
23 under the standards of FRCP 26 and contains highly propriety technical or trade  
24 secret or business information so that the risk of improper use or disclosure to  
25 another party outweighs the right of that party to review such information.

26           c. In the case of information voluntarily disclosed in these  
27 proceedings or disclosed as a result of discovery, the producing party or nonparty  
28 may identify and mark Confidential Information at the time when an affidavit,

1 pleading or memoranda is served, when the answer to the interrogatory or request  
2 for admission is served, when a copy of a document is provided or at the time of the  
3 inspection of the premises or thing.

4           d.       In the case of a depositions and deposition transcripts, the  
5 designating party or nonparty shall advise opposing counsel and the Court Reporter  
6 of the specific pages and exhibits to be maintained as Confidential Information at  
7 the deposition or within thirty (30) days after receipt of the transcript. The Court  
8 Reporter shall conform all materials in his or her possession to reflect such  
9 confidentiality designation and bind (or re-bind if necessary) separately those  
10 portions of the testimony and/or exhibits designated as Confidential Information and  
11 shall mark the face of the separately bound transcript containing such confidential  
12 testimony and/or exhibits CONFIDENTIAL - PURSUANT TO COURT ORDER or  
13 HIGHLY CONFIDENTIAL - ATTORNEY'S EYES ONLY - PURSUANT TO  
14 COURT ORDER, as appropriate. Until the expiration of the 30 day period, the  
15 entire transcript shall be deemed CONFIDENTIAL absent an agreement by the  
16 parties on the record.

17       4.       Inadvertent failure to designate Confidential Information as such prior  
18 to disclosure, production, or response, will not prevent a subsequent confidentiality  
19 designation by letter or email to counsel of record promptly sent after discovery of  
20 such inadvertent failure, provided that any disclosure made by the receiving party  
21 prior to receipt that communication shall not be a violation of this Order, nor shall  
22 the receiving party incur liability for use or disclosure of the information prior to the  
23 receipt of such communication.

24       5.       Unless and until the Court rules that any material so identified as  
25 CONFIDENTIAL is not, in fact, worthy of treatment as such and should be  
26 disclosed beyond the limits permitted by this Order, access, copying or  
27 dissemination of Confidential Information, shall be limited to:  
28

- 1           a.     Outside litigation Counsel of Record and their partners,  
2 associates, and their employees (including full-time stenographic, clerical and  
3 paralegal employees), and their outside copy services;
- 4           b.     Independent experts or consultants for a party, and their full-time  
5 clerical employees who are not employees of, or related in any way to, the parties or  
6 their affiliates, and whose advice, consultation and/or testimony are being or will be  
7 used by the parties in connection with preparation for trial of this action and/or any  
8 motions or appeals connected with the action provided, however, that at least  
9 seven (7) days prior to the disclosure of Confidential Information under this  
10 paragraph materials designated **HIGHLY CONFIDENTIAL—ATTORNEYS EYES**  
11 **ONLY**: (1) such persons are identified in writing to each party in the action; (2) the  
12 resume of the expert or consultant is provided to each party in the action; (3) the  
13 expert or consultant executes Exhibit A; and (4) a copy of Exhibit A is provided to  
14 each party in the action. If any party objects to the disclosure of such information to  
15 said expert or consultant, that party must serve a written objection within 3 business  
16 days after receipt of all of the information set forth herein and no disclosure of  
17 **HIGHLY CONFIDENTIAL—ATTORNEYS EYES ONLY** shall occur until all  
18 objections are resolved by the parties or by the trial court.
- 19           c.     Persons appearing for deposition provided that such persons: (1)  
20 authored or received such Confidential Information; (2) are established as being  
21 knowledgeable of the contents of such Confidential Information prior to the time of  
22 his or her testimony; or (3) is a current employee of the party (or non-party) that  
23 produced the Confidential Information (subject to the right of the producing party to  
24 object and move for a protective order prior to the deponent being given access to  
25 such Confidential Information). If a nonparties' Confidential Information is  
26 involved, that nonparty shall also be notified and all of the provisions of this  
27 paragraph that apply to parties shall apply to nonparties as well.
- 28           d.     The Court and its officers (including court reporters);

1 e. Any person who is employed by or is an officer of the parties,  
2 provided that such person executes Exhibit A and agrees to be bound by this Order;

3 f. Any other person that the parties hereto agree to in writing,  
4 provided that such person executes Exhibit A and agrees to by bound by this Order.

5 g. Any person listed on the initial disclosures of any of the parties  
6 as of June 23, 2011, provided that such person first executes Exhibit A and agrees to  
7 be bound by this Order. A copy of any Exhibit A that is executed by a person  
8 subject to this paragraph shall be promptly provided to the opposing party.

9 6. Unless and until the Court rules that any material so identified as  
10 HIGHLY CONFIDENTIAL – ATTORNEY’S EYES ONLY is not, in fact, worthy  
11 of treatment as such and should be disclosed beyond the limits permitted by this  
12 Order, access, copying or dissemination of Confidential Information, shall be  
13 limited to persons identified in paragraphs 5(a)-(d) above. The parties and any  
14 person subject to paragraph 5(f) shall not be entitled to receive material identified as  
15 HIGHLY CONFIDENTIAL information absent written agreement of the parties or  
16 further Order of the Court pursuant to paragraph 11 herein.

17 7. In accordance with Local Rule 79-5.1, if any papers to be filed with the  
18 Court contain information and/or documents that have been designated as  
19 “Confidential” or “Highly Confidential - Attorney’s Eyes Only,” the proposed filing  
20 shall be accompanied by an application to file the papers or the portion thereof  
21 containing the designated information or documents (if such portion is segregable)  
22 under seal; and the application shall be directed to the judge to whom the papers are  
23 directed. For motions, the parties shall publicly file a redacted version of the motion  
24 and supporting papers.

25 8. This Protective Order shall not foreclose any of the parties from  
26 moving this Court for an order that designated materials are not within the scope of  
27 protection afforded by FRCP Rule 26 or that Confidential Information designated as  
28 HIGHLY CONFIDENTIAL - ATTORNEY’S EYES ONLY should be reclassified

1 as CONFIDENTIAL. Any such motion shall comply with L.R. 37-1 and L.R. 37-2,  
2 and shall be subject to the provisions of Federal Rule 37 with respect to the payment  
3 of expenses. The party designating the material shall have the burden of proving  
4 that the designation is proper.

5 9. This Protective Order shall not prevent any of the parties or nonparty  
6 witnesses from applying to the Court for relief herefrom or for further or additional  
7 protective orders, or from agreeing between themselves to modification of this  
8 Protective Order, subject to the approval of the Court. No modification of this order  
9 will have the force or effect of a Court Order unless the Court approves the  
10 modification.

11 10. Subject to the limitations of this Protective Order, Confidential  
12 Information identified in accordance with paragraph 3 hereto may be used during  
13 discovery, in connection with any motion, at the trial and/or appeal of this action, or  
14 for any other purpose as this Court may allow.=-

15 11. In the event that a party desires to provide access to Confidential  
16 Information hereunder to any person or category of persons not included in  
17 paragraphs 5 or 6 hereof or under terms and conditions other than as the parties have  
18 agreed pursuant to paragraph 5 or 6 hereof, the party desiring to provide access shall  
19 move this Court for an order that such person or category of persons may be given  
20 access to the Confidential Information under such terms and conditions as the party  
21 shall designate in its motion papers. In the event that the motion is granted, such  
22 person or category of persons may have access to the Confidential Information  
23 provided that such person or persons have first agreed in writing to be bound by the  
24 terms of this Protective Order and have signed a copy of Exhibit "A" hereto.

25 12. Within ninety (90) days after final termination of this case, receiving  
26 counsel shall: 1) return all copies and samples of Confidential Information in its  
27 possession, custody or control to counsel for the party who has provided them or  
28 certify destruction thereof, except, however, counsel may retain one copy of any

1 pleading, interrogatory response, deposition transcript, or other document containing  
2 such Confidential Information, subject to paragraph 15 below; and 2) provide copies  
3 of Exhibit A signed by individuals that agreed to be bound by this Protective Order.

4       13. No copy of any deposition transcript or any portion thereof designated  
5 as Confidential Information shall be prepared or furnished by the reporter to any  
6 person other than to the outside counsel of record for the parties or counsel for the  
7 witness that was deposed. If given a confidentiality classification, the confidential  
8 portion of the transcript shall be retained by said counsel and, when used in this  
9 action, filed under seal in accordance with paragraph 6 above unless otherwise  
10 agreed upon by the parties.

11       14. In the event that a party or nonparty witness to which Confidential  
12 Information has been disclosed receives a discovery request, subpoena, order or  
13 other form of compulsory process requiring that it (the “subpoenaed party”) produce  
14 information, documents, things or other materials that have been designated as  
15 Confidential Information, the subpoenaed party shall promptly notify the  
16 designating party of the demand. If the designating party elects to resist production  
17 of the materials, it shall promptly so notify the subpoenaed party and the latter shall  
18 cooperate in affording the designating party the opportunity to oppose or limit  
19 production of the materials; provided that the designating party shall bear all  
20 expenses, including attorneys’ fees, incurred by the subpoenaed party in connection  
21 therewith. Nothing in this Order shall be construed as authorizing a party to disobey  
22 a lawful subpoena issued in another action, however.

23       15. This Protective Order shall survive the final determination of this  
24 action and shall remain in full force and effect after the conclusion of all of the  
25 proceedings herein in order to provide the Court with ancillary jurisdiction to  
26 enforce its terms and to ensure compliance herewith.

27       16. Nonparties may produce information and documents that will be  
28 governed by the terms of this Order by agreeing in writing to be bound by the terms



1 of this Order and following the procedure for designating Confidential Information  
2 described elsewhere in this Order.

3 17. This Protective Order has no effect upon, and shall not apply to, a  
4 party's use or disclosure of its own Confidential Information for any purpose. Also,  
5 nothing contained herein shall impose any restrictions on the use or disclosure by  
6 the Receiving Party of information that: (a) was already known to such party by  
7 lawful means prior to its disclosure by the Designating Party in this action; (b) is or  
8 becomes publicly known through no fault of the Receiving Party; or (c) is rightfully  
9 received by the Receiving Party from a third party which has authority to provide  
10 such information and who is without restriction on the use or disclosure of such  
11 information.

12 IT IS SO ORDERED:

13 DATED: July 5, 2011



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Honorable Robert N. Block  
United States Magistrate Judge

EXHIBIT A

UNDERTAKING OF

I, \_\_\_\_\_, state that:

1. My address is

2. My present employer is

3. My present occupation or job description is

4. My past and present business relationships with the party retaining my services are:

5. I have received a copy of the Protective Order in this action signed by the United States Magistrate Judge.

6. I have read and understand all of the provisions of the Protective Order.

7. I will hold in confidence and will not disclose to anyone not qualified under the Protective Order or use any materials designated CONFIDENTIAL or HIGHLY CONFIDENTIAL - ATTORNEY'S EYES ONLY which are disclosed to me except as permitted by that Order.

8. Having read the Protective Order, I will comply with all its provisions, including those not explicitly set out in this signed undertaking.

9. I agree to return all CONFIDENTIAL and HIGHLY CONFIDENTIAL ATTORNEY'S EYES ONLY materials which come into my possession, and documents or things which I have prepared relating thereto, to counsel for the party for whom I was employed or retained. I will do this immediately upon receiving a request from the counsel for the party for whom I was employed or retained or, in any event, by no later than thirty days after litigation between the parties has ended.

10. I hereby submit to the jurisdiction of the United States District Court for the Central District of California for the purpose of enforcement of this Protective Order.

DATED: \_\_\_\_\_